BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHRONDA QUARLES	)	
Claimant	)	
VS.	)	
	)	Docket No. 233,810
THE BOEING COMPANY	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY	)	
STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the August 28, 2001 Award entered by Special Administrative Law Judge William F. Morrissey. The Board heard oral argument in Wichita, Kansas, on March 8, 2002.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Frederick L. Haag of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes those records included in the two stipulations filed with the Division of Workers Compensation on February 15, 2000.

ISSUES

The parties stipulated that on April 18, 1998, claimant sustained personal injury by accident arising out of and in the course of employment with respondent. The only issue presented to Special Administrative Law Judge William F. Morrissey was the nature and extent of claimant's injury and disability. In the August 28, 2001 Award, Judge Morrissey

awarded claimant a 67 percent permanent partial general disability, which was based upon a 35 percent task loss and a 100 percent wage loss.

Respondent and its insurance carrier contend Judge Morrissey erred. They argue the respondent made claimant a valid job offer that would have paid a comparable wage but claimant refused to even attempt it. They also argue claimant failed to make a good faith effort to find work with another employer. Accordingly, respondent and its insurance carrier contend claimant's permanent disability benefits should be limited to the 10 percent functional impairment rating provided by Dr. Vito J. Carabetta.

Conversely, claimant argues respondent failed to offer claimant work within her permanent medical restrictions once Dr. Pollock determined what those restrictions were following a March 30, 1999 functional capacity evaluation (FCE). Claimant also contends that her task loss is 45.8 percent rather than the 35 percent as found by the Judge. Accordingly, claimant requests the Board to increase her permanent partial general disability to 72.9 percent.

The issue before the Board on this appeal is the amount of claimant's permanent partial general disability. Before that issue can be decided, the Board must also determine whether claimant unreasonably refused to perform a job that was offered by respondent or whether claimant failed to make a good faith effort to find other employment.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Claimant began working for respondent in November 1996. Claimant injured her back at work while she was crawling underneath a part and struck it. Claimant became stuck under the part and had to twist to get free. The parties have stipulated to an April 18, 1998 date of accident. The parties also have stipulated that claimant's accidental injury arose out of and in the course of employment with respondent as a spray painter.

2. Although she was seen and treated by others, orthopedic surgeon Dr. Anthony G. A. Pollock was claimant's primary treating physician. Dr. Pollock, who was familiar with claimant as he had treated her years earlier, first saw claimant for the April 1998 injury on May 13, 1998. Dr. Pollock placed temporary work restrictions on claimant and with those restrictions she continued to work for respondent in the paint department performing light and sedentary work that required no lifting greater than 10 pounds, no overhead work, and no bending but which permitted claimant to alternate sitting and standing every two hours.

3. In October 1998, when claimant's restrictions became permanent, respondent determined that claimant could not perform all of the duties that could be required under claimant's job title and sent her home. (Respondent's records indicate claimant's last day

of work was October 26, 1998.) On January 28, 1999, respondent placed claimant on medical layoff as claimant's work assignment violated her permanent work restrictions. On January 29, 1999, respondent wrote claimant and advised that the Reasonable Accommodation Review Board had determined no reasonable accommodations were possible and that the medical layoff would continue. Respondent also informed claimant to advise if her medical condition changed and she believed she could return to work.

4. Shortly before being placed on medical layoff, claimant spoke with vocational rehabilitation counselor Gail Carrier, who is employed by IAM C.R.E.S.T., an umbrella group employed by International Aerospace Machinists. Ms. Carrier's job is to assist respondent's employees in returning to work. According to Ms. Carrier, claimant advised her that she could perform part of her work assignment, preparing the struts for painting, without bending forward and, therefore, wanted to return to work. Ms. Carrier reminded claimant she must be able to do all of the job and not just one part. Nonetheless, on January 25, 1999, Ms. Carrier then wrote Dr. Pollock and requested him to review claimant's job assignment as a spray painter, representing that claimant believed she could perform the entire job.[1]

5. After receiving Ms. Carrier's letter (and without reexamining claimant), Dr. Pollock wrote Ms. Carrier on February 11, 1999, stating that claimant might be able to do the job but that he had reservations whether she could perform the lifting and carrying. The doctor wrote:

> I have reviewed the limitations of Shrondra [sic] Quarles job. I believe she would be capable of doing this job and the only reservations I have are the lifting and carrying limits. I had placed her on a 10 pound lifting initially and no bending, which are contrary to the job. I would continue to limit the overhead work or any work above shoulder height, and we would be prepared to increase her lifting to 25 pounds as a maximum and if Ms. Quarles believes she is able to do this job, then I would certainly be willing to give this a try.

6. Further confusion was added to the mix when Dr. Pollock 11 days later somewhat modified claimant's permanent restrictions when he prepared a medical release form dated February 22, 1999. In that form the doctor wrote that claimant could do clerical work that involved no lifting and carrying over 25 pounds and minimal overhead work involving no more than two hours out of an eight-hour shift. The doctor testified he prepared the

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[1] Ms. Carrier states in her personal handwritten notes that were introduced as exhibits at her deposition that claimant misunderstood that working with struts was only part of her job. Ms. Carrier writes: "This will probably [be] turned into a lawsuit as she [claimant] feels she is able to perform her job & was performing it w/ her perm lims. – This is basically misunderstanding the AW (6 months) plcmt = only performing part of her job. & performing w/ perm lims. Can't seem to get that through to her." Also, see Ms. Carrier's testimony at pages 67 and 69 of her deposition, where Ms. Carrier states that claimant thought working with struts was her regular job.

February 22, 1999 medical release slip after receiving a call in which respondent's medical department asked if respondent could disregard the 10-pound limit and increase it to 25 pounds for lifting and carrying. According to Dr. Pollock's testimony at his first deposition and the notes attached to the copies of the medical slips introduced as exhibits at the doctor's first deposition, respondent's medical department also advised that respondent had a clerical position that claimant could perform. The doctor testified, in part:

> Q. (Mr. Riedmiller) Do you know what precipitated the February 22, 1999 restriction or limitation?
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> A. (Dr. Pollock) Well, there was a call from Dana at Central Medical regarding the permanent restrictions which I had placed on her. She talked to Pam and was asking can we disregard the ten pounds, go to 25 pounds lifting/carrying, disregard the bending and some questions about limits on the overhead work. The new system for something. I can't read. For Cleco. No. Has clerical opening. Patient something. She can do this.
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> Q. Did you modify her restrictions/limitations?
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> A. As a result of that, what I did do, I said that she could do clerical work that involved no lifting or carrying over 25 pounds, minimal overhead work, no more than two hours in eight. I can't read it quite completely.[2]

7. The record does not clearly identify the date but sometime after respondent received Dr. Pollock's February 11, 1999 letter, respondent offered to return claimant to her regularly assigned job as a spray painter. But that job offer was placed on hold for the receipt of updated medical restrictions when respondent learned that claimant had an appointment to see Dr. Pollock in March 1999. On March 15, 1999, claimant saw the doctor and expressed her displeasure that he had modified her medical restrictions without examining or talking to her. The doctor discussed the confusion over the restrictions and determined a functional capacity evaluation (FCE) would be the best way to resolve the issue.

8. Respondent approved the FCE, which was conducted on March 30, 1999. Using the results from that evaluation, the doctor placed the following permanent medical restrictions on claimant: no lifting over 10 pounds, no overhead lifting, no carrying over 20 pounds, no pushing over five pounds and no pulling over three pounds. Based upon those restrictions, respondent could not return claimant to her regular job as a spray painter.

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[2] February 7, 2000 deposition of Dr. Anthony G. A. Pollock, at pages 20 and 21. Also see the notes on the reverse side of the February 22, 1999 medical slip contained in the exhibits to the doctor's deposition, which indicate that respondent's medical department called and advised respondent had a clerical opening that claimant thought she could do.

9. Other than the offer to return claimant to her regular job as mentioned above, respondent has made no attempts to re-employ claimant. But respondent and its insurance carrier did provide claimant with the services of a vocational rehabilitation consultant and a four-week job placement program. Claimant first saw vocational rehabilitation consultant Dan Zumalt on March 20, 2000. At the start of claimant's vocational rehabilitation program, claimant attended two days of a job seeking skills workshop, learning such things as how to develop an effective resume, how to make job contacts, how to interview and how to follow up on those contacts and interviews. According to Mr. Zumalt, during claimant's four-week program, she contacted 52 potential employers, including six of 24 leads that had been supplied by him.[3]

10. During the four-week job search, Mr. Zumalt was satisfied with claimant's efforts and progress as she was satisfying the requirement of making 10 job contacts per week. But at the end of the program, when claimant had failed to obtain a new job, Mr. Zumalt attempted to contact 16 of the 52 contacts that claimant had reported. For one company, Mr. Zumalt could not find a telephone listing and concluded that the company did not exist. In two telephone calls, Mr. Zumalt was advised that the person speaking could not confirm or deny that claimant had contacted their company. In five telephone calls, the person speaking told Mr. Zumalt claimant did not contact the company. And in two telephone calls, the companies confirmed claimant's application. The other companies did not respond.

11. Without contacting claimant and advising her of the responses being provided in his random telephone survey and without conducting any other type of follow-up, Mr. Zumalt concluded that claimant had lied about her job contacts and, accordingly, concluded that claimant failed to make a good faith effort to seek employment. Unfortunately, the results indicated by Mr. Zumalt's random telephone survey were not accurate as established by witnesses claimant called in rebuttal.

12. Following the March 30, 1999 FCE, claimant's restrictions remained the same until June 22, 2000, when Dr. Pollock had her undergo another FCE. That FCE indicated claimant had improved as she was now able to perform light work, lift up to 20 pounds and stand up to 25 minutes.

13. When claimant last testified at the September 18, 2000 rebuttal hearing, she remained unemployed. At that hearing, claimant introduced a job search record for the period of June 26, 2000, through September 13, 2000, showing claimant made three contacts the last week in June, 10 job contacts in July, 12 contacts in August, and another five during the first two weeks of September.

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[3] August 11, 2000 deposition of Dan Zumalt, at page 79.

14. Dr. Pollock testified that claimant has a five percent whole body functional impairment under the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). Considering the results from the more recent FCE, the doctor testified claimant has lost the ability to perform 13 or 14 of the 39 former job tasks identified by Karen Crist Terrill, the vocational counselor who was hired by respondent and its insurance carrier to analyze claimant's work history and itemize the job tasks that claimant performed in the 15 years before the April 1998 accident. On the other hand, considering the list of former work tasks that was prepared by James Molski, the vocational counselor hired by claimant, the doctor testified that claimant had lost the ability to perform 8 of the 24 former tasks. But, depending upon the actual physical requirements required of the job tasks, the doctor indicated that claimant may, perhaps, not be able to perform several additional tasks identified by Ms. Terrill.

15. Conversely, Dr. Vito J. Carabetta, who examined claimant at the request of respondent and its insurance carrier in March 2000, testified claimant has lumbar degenerative disk disease that constitutes a 10 percent whole body functional impairment under the AMA *Guides* as a result of the April 18, 1998 accident. Further, the doctor testified that claimant had lost the ability to perform 12 of the 39 tasks identified by Ms. Terrill and had, perhaps, lost the ability to perform several more depending upon how the task was actually performed. Dr. Carabetta reported that claimant could occasionally lift no more than 20 to 25 pounds, frequently lift or carry no more than 10 to 15 pounds and occasionally bend and stoop, but it is critical that she frequently change positions.

16. The third doctor who testified in this claim was Dr. Pedro A. Murati, whom claimant hired to provide medical opinions for this litigation. Dr. Murati saw claimant in March 1999 and diagnosed lumbosacral strain with radiculopathy, left sacroiliac joint dysfunction and cervical strain with radiculopathy. According to Dr. Murati, claimant had a 10 percent whole body functional impairment for the lumbosacral strain and a 15 percent whole body functional impairment for the cervical strain, which combined for a 24 percent whole body functional impairment. After reviewing Mr. Molski's task list, the doctor testified that claimant had lost the ability to perform 11 of the 24 tasks. Dr. Murati indicated that, among other restrictions, he would limit claimant's lifting, carrying, pushing and pulling to 20 pounds occasionally, 10 pounds frequently, and five pounds constantly. He also would have claimant alternate her sitting, standing, and walking and limit her bending, climbing and squatting to an occasional basis.

CONCLUSIONS OF LAW

1. The Judge's conclusion that claimant has a 67 percent permanent partial general disability should be affirmed.

2. Because claimant has a permanent back injury as a result of the April 1998 accident, her injury is an "unscheduled" injury, which is governed by K.S.A. 1997 Supp. 44-510e. That statute defines permanent partial general disability as follows:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. Furthermore, in *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the post-injury ability to earn wages rather than the actual post-injury wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[6]

3. The Board concludes that claimant neither refused to perform nor refused to attempt to perform any work offered by respondent. The record is quite clear that the offer to return claimant to her regular job that respondent made to claimant following Dr. Pollock's February 11, 1999 letter was placed on hold to clarify claimant's restrictions. And when those restrictions were clarified, it was clear to respondent that claimant was unable to return to her regular duties as a spray painter. Accordingly, the doctrine promulgated in

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Copeland*, at 320.

Foulk does not preclude claimant from receiving an award for a work disability (a permanent partial general disability greater than the functional impairment rating).

4. The Board also concludes that claimant made a good faith effort to find alternative employment when it became evident that respondent would not accommodate her permanent work restrictions. The Board also concludes that Mr. Zumalt's conclusion that claimant did not put forth a good faith effort in the four-week job placement plan is without foundation and based upon erroneous information. It is troublesome that in such important matters a vocational rehabilitation counselor would make such conclusions based upon random telephone calls without additional follow-up and without permitting a client to respond to such accusations. The Board disagrees with Mr. Zumalt's opinion that additional follow-up with the randomly selected contacts would skew his random sampling. Rather, the Board concludes an appropriate follow-up with the contacts would provide more accurate results from the sampling.

5. As claimant has made a good faith effort to find appropriate employment, claimant's 100 percent wage loss should be used in the permanent partial general disability formula. The Board concludes claimant has a 33 percent task loss. The Board concludes Dr. Pollock's opinions regarding task loss are the most persuasive and finds that claimant has lost the ability to perform approximately 33 percent of the job tasks that she performed in the 15-year period before the April 1998 accident. Averaging claimant's 100 percent wage loss with the 33 percent task loss, the Board affirms the Judge's conclusion that claimant has a 67 percent work disability.

6. The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

7. The parties introduced many documents that have little, if any, evidentiary value. For future reference, the parties are reminded and encouraged to introduce only those records that are material to the issues. To do otherwise unnecessarily burdens the record.

AWARD

WHEREFORE, the Board affirms the August 28, 2001 Award entered by Special Administrative Law Judge William F. Morrissey.

IT IS SO ORDERED.

Dated this ____ day of March 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Frederick L. Haag, Attorney for Respondent and its Insurance Carrier
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Workers Compensation Director